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Case No. 20150338-CA

IN THE
UTAH COURT OF APPEALS

State of Utah
Plaintiff/Appellee

VS.

FRANK REYOS Defendant/Appellant

REPLY BRIEF OF APPELLANT

APPEAL FROM A CONVICTION OF AGGRAVATED MURDER, AND
POSSESSION OR USE OF A FIREARM BY A RESTRICTED PERSON
IN THE THIRD JUDICIAL DISTRICT COURT

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UTAH APPELLATE COURTS

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POINT I
TRENTON TAYLOR'S COMPLETE FAILURE OR REFUSAL TO
RECOLLECT HIS MEETING WITH POLICE AND PRIOR
STATEMENT, MADE HIS TESTIMONY "UNAVAILABLE" FOR
MEANINGFUL OR EFFECTIVE CROSS-EXAMINATION.
ADMITTING HIS PRIOR STATEMENT THUS VIOLATED
THE DEFENDANT'S RIGHT TO CONFRONTATION AND UTAH RULES
OF EVIDENCE.

The gravamen of Mr. Reyos' argument in Point I of his opening brief is that Trenton Taylor's testimony was "unavailable," within the meaning of both the Utah Rules of Evidence, specifically, Utah R. Evid. Rule 804(a): "(a) Criteria for being unavailable. -- A declarant is considered to be unavailable as a witness if the declarant: (3) testifies to not remembering the subject matter; . . ." Taylor testified to remembering nothing.

That is the problem. The United States Supreme Court has consistently held:

Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness *and subject to full and effective cross-examination.*

Cal. v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 1935 (1970), cited by the State.

St. Br., p. 17-18. But Mr. Reyos did not have the opportunity for "full and effective cross-examination." Where a witness is unavailable, even "prior to trial or preliminary hearing testimony is admissible only if the defendant *had an adequate opportunity to cross-examine.*" *United States v Crawford*, 541 U.S. 36,

57, 124 Sup. Ct. 1354,1367 (2004)(emphasis added) citing, *inter alia*, *California v. Green*, 399 U.S. at 165-168. *Green* is simply a case where the witness took the stand, and the prosecution introduced a prior inconsistent statement made at preliminary hearing under oath, although not subject to cross examination, as substantive evidence. *Green*, 399 U.S., at 152. “(W)e do not find the instant preliminary hearing significantly different from an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause. *Id.* at 149. That is consistent with Utah law, but it is not this case. The prior statement of Trenton Taylor was not inconsistent with his testimony of having no memory of it whatsoever. He was simply mentally and totally emotionally unavailable, had never been cross-examined and could not be cross-examined at trial.

A major distinction between this case and *Green*, which the State has not addressed, is the fact that the witness in *Green* acknowledged making the prior statement: “the Confrontation Clause does not require excluding from evidence the prior statements of a witness *who concedes making the statements*, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories. *Cal. v. Green*, 399 U.S. at 164. That is not the instant case. The Court in *Green* simply ratified what is well understood, that a prior inconsistent statement may be introduced as substantive evidence. See

2011 Advisory Committee Note to Utah R. Evid. Rule 801 with respect to subsection (d)(1). The essential nub of the inquiry as highlighted by *Green* is whether the statement in the instant matter was inconsistent (or consistent) with Taylor's testimony. In fact, it was neither. Consequently it was hearsay and should have been excluded for Mr. Reyos' inability to cross-examine. See *State v. Barker*, 797 P.2d 452 (Utah Ct. App. 1990) ["(R)ule 801(d)(1) applies only if the declarant "is subject to cross-examination concerning the statement." Cross-examination in *Barker* was denied by the trial court. Thus, the declarant's out-of-court, inconsistent statement was deemed hearsay and should not have been admitted. The party adversely affected by it has a right to examine the declarant concerning the statement.]. *Id.* at 455.

The question turns on whether the witness testimony was available for cross-examination. "Whether a witness is "unavailable," is controlled by Utah R. Evid. 804(a)." *State v. Barela*, 799 P.2d 1140, 1143 (Utah Ct. App. 1989). A witness is unavailable if he "testifies to not remembering the subject matter." Utah R. Evid. 804(a)(3). This is consistent with federal authorities:

The Federal Rules of Evidence recognize that a witness may be classified as "unavailable" for the purpose of the hearsay exception if he "testifies to a lack of memory" and his "claim of lack of memory" is not the result of any wrong-doing by the moving party. Fed. R. Evid. 804(a). See also J. Weinstein and M. Berger, *Weinstein's Evidence*, § 801(d)(1)(A)[04], at 100 n.13 (1980); Saltzburg and Redden, *Federal Rules of Evidence Manual* at 600, 613 (2d Ed. 1977).

United States v. Hsu, 439 A.2d 469, 471 (D.C. 1981). In other words, as in the instant case, the witness remembers nothing of "the subject matter." That is different from remembering the subject matter, but forgetting the substance, or details, which would be subject to cross-examination. "It makes no difference whether the witness becomes "unavailable" before or after she takes the witness stand." *People v. Learn*, 396 Ill. App. 3d 891, 898-99, 336 Ill. Dec. 117, 124, 919 N.E.2d 1042, 1049 (2009) citing *People v. Coleman*, 205 Ill. App. 3d 567, 583, 563 N.E.2d 1010, 150 Ill. Dec. 883 (1990)[“ A similar conclusion as to when a child witness becomes "unavailable" has been reached by the Federal courts (see, e.g., *Gregory v. North Carolina* (4th Cir. 1990), 900 F.2d 705 (and cases cited therein)), and in the State courts (see, e.g., *State v. Jones* (1989), 112 Wash. 2d 488, 772 P.2d 496; *State v. Chandler* (1989), 324 N.C. 172, 376 S.E.2d 728; *State v. Drusch* (1987), 139 Wis. 2d 312, 407 N.W.2d 328).].

The State cites a post-*Crawford* case which does not speak to the specific issue in the instant case, but is illustrative of the problem. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311, 129 S. Ct. 2527, 2532 (2009) citing *Crawford*, *supra*, at 541 U.S. 54, 124 S. Ct. at 1354. St. Br. p. 18. The Massachusetts trial court in *Melendez-Diaz* admitted into evidence affidavits reporting the results of forensic analysis showing that material seized by the police and connected to the defendant was cocaine. The issue was whether those affidavits were "testimonial,"

rendering the affiants "witnesses" subject to the defendant's right of confrontation under the Sixth Amendment. *Id.*, 557 U.S. at 307, 129 S. Ct. at 2530. The *Melendez* Court held that,

the analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to "be confronted with" the analysts at trial.

Id., 557 U.S. at 311, 129 S. Ct. at 2532 citing *Crawford*, 541 U.S. 54, 124 S. Ct. at 1354.

Suppose, arguendo, the forensic analysts in *Melendez* were called to the witness stand and testified to the effect that, yes the signature on the certificate looked like his but he had no recollection of either performing the analysis, preparing the report, or rendering an opinion. In other words, the analyst's recollection was not in any way refreshed and he could not remember any aspect of the analysis or the report. In such a case, he would be "unavailable as a witness," having testified to not remembering the subject matter; . . ." as enunciated in Utah R. Evid. 804. This is precisely the instant circumstance. The witness, Trenton Taylor, should have been declared unavailable under 804(a)(3).

The State cites *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980) essentially for the proposition that as long as there is a body in a chair capable of taking the oath, that satisfies all Confrontation Clause concerns. *St. Br.*

at 18. *Crawford* rejected *Roberts* application of an evidentiary standard, i.e., allowing admission of an out-of-court statement of an unavailable witness, who testified at preliminary hearing but was not fully cross-examined, on the basis that the statement bore "adequate 'indicia of reliability'" and fell either within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 50-51. The Court in *Crawford* held: "Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Crawford*, 541 U.S. at 50-51. *Crawford* made clear in rejecting various evidentiary rules as a measure of reliability, as *Roberts* had done, that the Confrontation Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. *Id.* at 61. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined. *Id.* *Crawford* further noted that, "(i)n sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* 541 U.S. at 53.

The confrontation contemplated is "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-243 (1895). It cannot be called a face to face, eye to eye, confrontation when the witness sits in total amnesia of the subject matter. One of the concerns of the *Crawford* Court was allowing statements into evidence which may have satisfied the local, changeable rules of evidence. "The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford v. Washington*, 541 U.S. at 63. Trenton Taylor's statement might arguably be construed to satisfy Rule 801, but it cannot satisfy the Confrontation Clause, because his testimony was unavailable.

Here, the trial court determined that, even though Taylor remembered nothing of the prior interview or events surrounding it, he was "available" to testify and could be cross-examined under Rule 801(d). R.1256-1260. This cannot be where a witness flatly remembers nothing whatsoever of the subject matter. That was exactly one of *Crawford's* "rules of evidence" concerns. The vagaries of Rule

801 simply make the test “unpredictable” and allows admission of “core testimonial statements that the Confrontation Clause plainly meant to exclude.” *Crawford*, 541 U.S. at 63.

The State further cites *State v. Eldredge*, 773 P.2d 29 (Utah Sup.Ct. 1989) for the proposition that if a witness is present, he cannot be unavailable regardless of whether he can be meaningfully or effectively cross-examined. Br. St. 18. But *Eldredge*’s holding is mainly non-binding dicta, that “the admission of such hearsay does not abridge a defendant’s right to confrontation if the child victim is present and available to testify and be cross-examined.” Ibid at 33. That is because the Court in *Eldredge* further elaborated, “*here the child actually testified and was cross-examined quite effectively.*” Id. (emphasis added). *Eldridge* is thus thoroughly distinguishable.

As previously pointed out, “In determining unavailability, the focus is not on the unavailability of the witness per se *but on the unavailability of his or her testimony.*”” Mr. Reyos’ Opening Brief (“OB”), at 32, citing *Mangrum* and *Benson* on Utah Evidence, 2015 – 2016 Ed., page 866 (emphasis added) and numerous authorities. “A witness should be found unavailable under Rule 804(a)(3) only if he insists he has no recollection of the alleged crime.” *State v. Marcum*, 750 P.2d 599, 603 (Utah Sup.Ct. 1988) citing *United States v. Hsu*, 439 A.2d 469 (D.C. 1981), cited *supra*; *People v. Liddicoat*, 120 Cal. App. 3d 512, 174 Cal. Rptr. 649

(1981)(witness present but deemed not competent to testify at trial, was therefore unavailable, allowing admission of her preliminary hearing testimony); *David v. State*, 269 Ark. 498, 601 S.W.2d 864 (1980)(a witness is unavailable under evidence Rule 804(a) if he testifies to a lack of memory on the subject).

The State asserts that the pre-*Crawford* case, *United States v. Owens*, 484 U.S. 554, 108 S. Ct. 838 (1988), vindicates its position. Br.St. 19. *Owens* allowed “an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification,” on the basis that it was admissible under evidence Rule 801 as opposed to 804. *Owens*, 484 U.S. at 564, 108 S. Ct. at 845. Rule 801 specifically defines as “not hearsay,” a statement which “identifies a person as someone the declarant perceived earlier.” See Ut. Rules. Evid. Rule 801(d)(1)(c). Whether *Crawford*, given its rejection of the *Roberts*’ reliance on traditional rules of evidence, would approve of this clearly testimonial statement of a police officer, is unknown. In any event, *United States v. Owens* does not address the instant circumstances.

Nor is the even earlier case, *Delaware v. Fensterer*, 474 U.S. 15, 106 S. Ct. 292 (1985), cited by the State helpful. Br. St. p. 19-20. In *Fensterer* the question was whether the admission of the opinion testimony of the prosecution's expert witness, who was unable to recall the basis for his opinion, denied *Fensterer* his

Sixth Amendment right to confront the witnesses against him. *Id.*, 474 U.S. 16, 106 S. Ct. 292-93 (1985). The Supreme Court held that,

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given *a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.*

Id., 474 U.S. at 21-22, 106 S. Ct. at 295. The language of *Fensterer* highlights the problem in this case, which is not that his testimony was “marred by forgetfulness,” but that he essentially did not testify, remembered nothing, in absolute terms, and the defense was not afforded “a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.” *Id.*

It is difficult to understand the State's conclusion that Mr. Reyos may have somehow abandoned the hearsay argument. Br.St. p. 21. Non-availability was clearly the basis of Mr. Reyos' argument. Ut. Rule of Evidence 804 as a basis for finding “unavailability” was referenced throughout Point I. See OB, pps. 28, 31, 32. These references are well subsequent to the reference to *Crawford* and the Confrontation Clause on page 25 of the Opening Brief, and Mr. Reyos' isolated statements are taken out of context. True, Point I is phrased in terms of

confrontation. But that is merely a heading. The heading of a Point does not foreclose argument of other matters not included therein. The determination of “unavailability” is necessarily a determination which must be made by reference to the rules of evidence. See OB p. 32, discussing the fact that it is not the witness’ unavailability but the unavailability of the testimony in relation, *inter alia*, to Rule 804 and the scholarly works cited which discuss the subject. Further, the State truncated the statement made on page 31 of the opening brief, which was a reference to a specific case, *United States v. Baker*, 432 F.3d 1189, 1203 (11th Cir. 2005), citing *Crawford* 541 U.S. at 52, 59, about which it was stated, “Since the argument regarding the rules of evidence is rendered academic by *Crawford*, ““(I)f hearsay is “testimonial,” . . . the Confrontation Clause prohibits its admission at trial unless (1) the declarant is unavailable, and (2) the defendant has had a prior opportunity to cross-examine the declarant.”” OB p. 31. The reference was clearly to the “testimonial” nature of prior statements, and read in context with the remainder of Point I, was obviously not intended as a complete abnegation of the hearsay rule. Otherwise, the numerous references to Ut. Rule Evid. 804 as well as 801 would have been immaterial and unnecessary. As Mr. Reyos put it, subsequent to the quoted statement, “The rules of evidence are of course relevant to the issue of availability.” OB p. 31.

Mr. Reyos' statement that the error was structural is also challenged by the State, Br. St. p. 22, as having been rejected by *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431 (1986) in its discussion of the case cited by Mr. Reyos, *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S. Ct. 1245, 1246 (1966). OB p. 35. What the Supreme Court in *Van Arsdall* stated about *Brookhart* is highly relevant and illuminating in the instant matter. It said, quoting *Brookhart*, as follows:

(Davis) [*Davis v. Alaska*, 415 U.S. 308(1974)] was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart v. Janis*, 384 U.S. 1, 3." 415 U.S., at 318 (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

Read properly, however, *Davis* does not support an automatic reversal rule, and *the above-quoted language merely reflects the view that on the facts of that case the trial court's error had done "serious damage" to the petitioner's defense.*

Del. v. Van Arsdall, 475 U.S. 673, 682-83, 106 S. Ct. 1431, 1437 (1986)(emphasis added). The emphasized language underscores the focus of Mr. Reyos' Point I. The inability to effectively cross-examine Trenton Taylor, a virtual inability to engage in the time honored face to face confrontation in spite of his physical presence, rendered his testimony "unavailable," and the introduction of his *ex parte* police interrogation was a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Brookhart*, 384 U.S. at 3. There is a reasonable likelihood of a more favorable outcome for Mr. Reyos had Taylor's statement been kept out of evidence. *State v. Medina-Juarez*, 2001 UT

79, ¶ 18, 34 P.3d 187. In any event it was an error of sufficient consequence that this Court's confidence in the verdict must necessarily be undermined. *Id.*

POINT II

THE TRIAL COURT ERRED IN REFUSING TO GRANT MR. REYOS' MOTION FOR A DIRECTED VERDICT BASED UPON THE INHERENTLY IMPROBABLE EVIDENCE PROVIDED BY THE UNRELIABLE TESTIMONY OF NATASHA ALVORADO.

The State acknowledges that "Reynos moved for a directed verdict, he said only that "the State has not proven the elements beyond a reasonable doubt and that no jury could find that." R1509. Given the testimony (or lack thereof) at trial, this motion could not relate to anything other than the upside down testimony of Natasha Alvorado. Take out the prior statement of Trenton Taylor as discussed in Point I, *supra*, and what one must rely upon is the testimony of Alvorado. She was the only purported percipient witness. Thus, the motion for a directed verdict could only have gone to the validity of the testimony of Alvorado.

Even under the plain error standard, it should have been clear to the trial court that "(i) [a]n error exists in the ramshackle nature of Alvorado's testimony; (ii) the error in basing a verdict on such dubious testimony was obvious; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or confidence in the verdict is undermined." *State v. Christensen*, 2014 UT App 166, ¶ 11, 331 P.3d 1128, 1132 citing *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). The evidence supporting the

conviction of the crime charged was insufficient and the insufficiency was so obvious and fundamental that the trial court erred in submitting the case to the jury.” *Holgate*, 2000 UT 74, ¶17.

In order to establish that Alvorado’s testimony was anything but “inherently improbable,” the State relies upon the *ex parte* statement of Trenton Taylor, which, as argued in Point I, *supra*, should never have been admitted. St. Br. 25-26. The error regarding Taylor’s testimony only compounds the problem of Alvorado’s testimony. It should have been obvious to the trial court that Alvorado’s testimony could not, alone, withstand scrutiny.

The State further argues that the surveillance video evidence supports Alvorado’s testimony. Br. St. p. 26. But Detective Hudson’s testimony regarding what he observed on the video is very confusing, occasionally vague, and difficult to understand in general. R.1024-1071. In fact, based upon the video, the police believed that a body was being carried out of the motel, that the case involved a body dump. R.1496-7; R.1524; R.1521. All the record establishes about the case is that it could as easily been a murder by Natasha or any combination of her and/or one of the other miscreants who were habitués of room 110 at Zion’s Motel, and a body dump, as testified by Shelby Reed and further testified and sworn to by Detective Lougy. R.1522-24.

The evidence was so inconsistent and inconclusive that the trial court should well have realized it would not pass muster and that no reasonable jury should have been allowed to speculate on the guilt of Mr. Reyos. The State is correct that where the prosecution possesses evidence conducive to the end of establishing guilt, that it be given due opportunity to do so. Br. St. p. 27 citing *State v. Lamorie*, 610 P.2d 342, 345-347 (Utah Sup.Ct. 1980). Mr. Reyos agrees with the State that, “Because trial error is essentially a failure of process, the remedy is further process . . .” Br. St. p. 28. That is what brings the case to this Court – for a determination that the trial court erred.

But this Court, in reviewing the matter as a whole, must recognize the invalidity of basing corroboration upon the *ex parte* statement of Trenton Taylor. This is contrary to the view of the State that,

In other words, even if this Court were free to discount Alvarado’s testimony as incredible, it is not free to discount Taylor’s prior statements in reviewing the sufficiency of the evidence. And because Taylor’s prior statements provide sufficient evidence to convict Reyos of aggravated murder, Reyos’ *Robbins* claim fails.

Br. St. p. 28. But this Court should take into consideration the inadmissibility of Trenton Taylor’s testimony in evaluating the verity and trustworthiness of Alvarado’s testimony via *State v. Robbins*, 2009 UT 23, 210 P.3d 288. The State relies on Alvarado’s own self-serving statement that her “drug use may have affected her memory of when things happened, but not her memory of what Reyos

did and why.” Br. St. p. 31. But that hardly rehabilitates the numerous versions of what may have happened which she gave to the police and others as set forth in considerable detail in Mr. Reyos’ Opening Brief, Point II. The question remains – which version?

On this record, even if reviewed for plain error, which Mr. Reyos does not concede is required, there was an insufficiency of the evidence that was “so obvious and fundamental that the trial court erred in submitting the case to the jury.” *State v. Holgate*, 2000 UT 74, ¶ 17, 10 P.3d 346.

POINT III

THIS COURT SHOULD CONSIDER THE CONSTITUTIONALITY OF THE SENTENCING SCHEME PRESENTED UNDER UTAH CODE ANN. §§ 76 – 3 – 207.7 AND 76-5-202 AS WELL AS WHETHER A JURY SHOULD HAVE SENTENCED MR. REYOS, OR WHETHER, AT A MINIMUM, THE JURY SHOULD HAVE MADE THE FINDINGS UNDERLYING HIS SENTENCE.

A. AN ILLEGAL SENTENCE MAY BE CORRECTED AT ANY TIME.

This unpreserved issue is entirely a legal one, for which this Court would give deference to a trial court’s ruling. For the reasons stated in Point III of Mr. Reyos’ Opening Brief, which will not be reiterated, it is a rare procedural anomaly. In brief, it is a rare occurrence, and highly anomalous, where two statutes address sentencing of individuals convicted of the same offense, i.e., aggravated murder. One provides for sentencing by a jury, the other for sentencing to occur by the trial

judge, yet both are convicted of the same offense, aggravated murder. What is anomalous is that both are, at the time of sentencing, similarly situated. Yet one is sentenced by the court, the other by a jury. The circumstances are no less exceptional than those set forth in the cases cited by the State. Br. St. 34.

In any event, it is well recognized that, an illegal sentence may be corrected at any time. Utah R. Crim. P. Rule 22(e); *State v. Houston*, 2015 UT 40, ¶ 16, ___P3d___, (2016). So regardless of whether the argument was made or preserved, whether it is in fact a “rare procedural anomaly,” or whether it should be reviewed for “manifest prejudice,” this Court can address the question of the constitutionality of the questions which are thoroughly briefed by both Mr. Reyos and the State. The Supreme Court in *Houston* stated:

As we describe in greater detail below, we hold that each of Mr. Houston's constitutional challenges falls within the narrow scope of rule 22(e)'s exception to the preservation of claims. We therefore decline the State's request to overrule our precedent in *State v. Candedo*. Under rule 22(e), we treat Mr. Houston's claims as if they had been preserved, reviewing conclusions of law for correctness and granting no deference to the district court. Because rule 22(e) provides a higher standard than "manifest prejudice" review, we decline to address Mr. Houston's alternative argument.

State v. Houston, 2015 UT at ¶ 16.

**B. THE STATUTORY SCHEME SUBJECTS MR. REYOS TO A
DISPARATE SENTENCING STATUTE FROM OTHERS
SIMILARLY SITUATED.**

The State argues that the constitutional challenge to the sentencing scheme raised in Point III of Mr. Reyos' Opening Brief is foreclosed by controlling precedent. Br. St. p. 31. It correctly identifies the two sentencing statutes in question: Utah Code Ann. 76 – 3 – 207 and 76 – 3 – 207.7. Br. St. p. 31-32.

Although the State speaks in terms of a subsequent more lenient sentence, to which one convicted of a crime would be entitled under the rule of lenity, it seems to recognize that if there are two, side-by-side, statutes which punish the same crime, a person convicted would be entitled to the more lenient one. Br. St. p. 39. The point is not necessarily that one sentenced under one statute would necessarily be advantaged by not being sentenced under the other. The point is that one statute, under the circumstances of the individual case, may lend itself to sentencing by a jury, where in another case, sentencing before the court might be advantageous. One may be more lenient than the other, depending on the circumstances. This begs the question of why there are two separate statutes which provide for sentencing for the same identical offense. This is why the sentencing scheme is arbitrary and capricious.

There is no question that *State v. Perea*, 2013 UT 68, 322 P.3d 624 addressed the constitutionality of 76-3-207.7 and ruled that in the context of Utah's entire sentencing scheme, sufficient guidance was provided under the totality of circumstances. *Perea* at ¶ 110. The Court in *Perea* declined to visit Perea's due

process claim, as inadequately briefed. Id. ¶122. The State seems to believe that Reyos is challenging the holding of *Perea*. Addressing as it does only §76-3-207.7, Mr. Reyos is not attempting to persuade this Court to depart from the holding of *Perea*. Nor, except as discussed *infra*, does Reyos have any reason to challenge the holding of *State v. Houston, supra*, as it addresses sentencing provided by § 76-3-207, as it is taken in isolation.

C. THE STATUTORY SCHEME FOR SENTENCING AGGRAVATED MURDER VIOLATES THE UNIFORM OPERATION OF LAWS CLAUSE BECAUSE NOT ALL PEOPLE CONVICTED OF AGGRAVATED MURDER ARE SIMILARLY SITUATED.

In discussing the claims made by Mr. Reyos, the State consistently responds to the arguments made in the Opening Brief Point III, by taking one statute or the other, primarily §76-3-207.7, as though the claim were against that statute alone. Br. St. pps. 41-44. That misses the point entirely. The problem is not that one or the other statute is deficient. The problem is precisely that there are two statutes which address exactly the same offense for sentencing purposes. Any distinction is mere semantics. Mr. Reyos does not gainsay that each of the statutes, as construed, is underlain with standards which guide the sentencer's hand. That is not the issue.

The State argues that the "noncapital sentencing statute does not violate the uniform operation of laws clause because not all people convicted of aggravated

murder are similarly situated.” Br. St. p.41. That is not the point. The fact of the matter is, not all people convicted of any crime are similarly situated. The similarity lies in the fact that, everyone convicted of a burglary will be sentenced under the statute addressing burglaries, everyone convicted of rape will be sentenced under the penalty statute addressing rape, et cetera. It is axiomatic that no two burglaries are alike, no two rapists are alike, no two offenders of any particular crime are alike, i.e., their backgrounds and the circumstances of each crime will be such that no two individuals will be truly “similarly situated.” That is the same with those convicted of aggravated murder, whether the case begins with the prosecutor giving notice of intent to seek the death penalty, or not. If in the end, each being convicted of aggravated murder (or “non-capital” murder or “capital murder” sans the death penalty), neither will be subjected to the death penalty. There simply is no rational basis for one to be sentenced by the court and the other to be sentenced by a jury. That is the sum and substance of Mr. Reyos’ argument: that the sentencing scheme for aggravated murder (call it capital or noncapital), where the death penalty is off the table, violates the uniform operation of laws clause under the Utah State Constitution and equal protection of the laws under the United States Constitution because it divides similarly situated persons into two subclasses for sentencing purposes with no rational basis. The statutory

dichotomy is arbitrary and capricious, violates due process, equal protection, and the uniform application of the law.

The Fourteenth Amendment guarantees all citizens equal protection of the law. U.S. Const. amend. XIV. Article I, Section 24 of the Utah Constitution requires "that the operation of the law be uniform." The Utah Constitution provides that, "All laws of a general nature shall have uniform operation." Utah Const. Art. 1, Sec. 24. As laid out in the State's brief, there are three questions which must be answered in order to determine a violation of the uniform operation clause: 1. What, if any, classification is created under the statutory scheme; 2. Whether the classification imposes on similarly situated persons disparate treatment; and 3. Whether the Legislature had any reasonable objective that warrants the disparity. Br. St. p. 42, quoting *Houston* at ¶ 43. The State maintains that Reyos fails the second step of the analysis. Br. St. p. 42. That would be true if only one statute were involved. But there are two statutes, one sentencing for aggravated murder if the jury has found that the death penalty should not apply, the other sentencing for aggravated murder if the prosecutor decides that the death penalty should not apply. There is no rational basis for the distinction and the disparate treatment, taking 207 and 207.7 together, cannot be justified on the basis of anything but semantics. "If a notice of intent to seek the death penalty has been filed, aggravated murder is a capital felony."

Utah Code Ann. § 76-5-202(3)(a). Calling one convicted by a jury, but the jury having found against the death penalty, a capital murder, and the other, the prosecutor having removed the death penalty from the equation, and aggravated murder or noncapital murder, is simply sophistry.

Because the arguments made by the State do not address this issue, but undertake a response to arguments not made by Mr. Reyos, no further response to those arguments will be put forth.

D. *ALLEYNE V. UNITED STATES* ENTITLES MR. REYOS TO JURY SENTENCING BECAUSE ANY FACT THAT INCREASES THE MANDATORY MINIMUM, TWENTY-FIVE YEARS, IS AN “ELEMENT” THAT MUST BE SUBMITTED TO THE JURY.

The last point made by the State is that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) does not require a jury to make findings when increasing a minimum penalty. Br. St. p. 44. This may be true, arguendo, when a defendant pleads guilty, “because (when) Houston pled guilty, he ‘admitted all the facts relevant’ to make him subject to a potential life-without-parole sentence. Id. ‘There were no factual findings to be made by a jury, only a determination that [life without parole] would or would not be appropriate.’” Br. St. p. 45 quoting *Houston*, ¶ 32. It is certainly not true in a circumstance where there has been a trial by jury and no specific findings have been made by the jury to provide the judge a basis to sentence beyond the minimum mandatory of 25 years, as provided for aggravated murder. Utah Code Ann. § 76-3-207.7 provides for two choices, life in prison

without parole, or 25 years to life. Under section 76-3-207.7, 25 years to life is the presumptive default sentence, not Life Without Parole. *State v. Reece*, 2015 UT 45, ¶¶ 81- 83 n.149, 349 P.3d 712. Thus, a jury finding which increases the minimum mandatory sentence of 25 years to life is required. *Alleyne v. United States*, 133 S. Ct. 2151 (2013) states that *Apprendi* applies to minimum mandatory sentences as well:

. . . any fact that increases the mandatory minimum is an “element” that must be submitted to the jury. Accordingly, *Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406(2002)] is overruled.

Alleyne at 2155 (2013). It cannot be made much more clear than that.

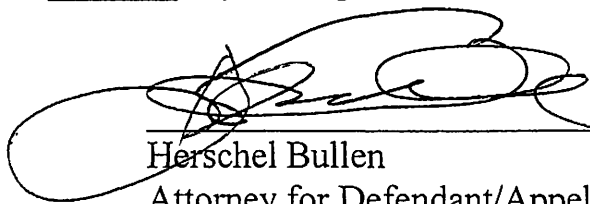
Thus, 76-3-207.7 is unconstitutional under the *Apprendi/Alleyne* standard because it fails the requirement that “(f)acts that increase the mandatory minimum sentence are . . . elements and must be submitted to the jury and found beyond a reasonable doubt,” *Alleyne*, 133 S.Ct. at 2158 (2013). An increase from 25 to life to LWOP must be based upon a jury’s determination of the facts supporting the increase. The State counters that “*Alleyne* itself explains that so long as a jury finds all the facts necessary to expose a defendant to a given range of punishments, the judge has “broad discretion . . . to select a sentence within the range authorized by law.” Br. St. p. 46, quoting *Alleyne*, 133 S. Ct. at 2163; accord *Apprendi*, 530 U.S. at 481. But in this case, there is no “range” “within” 76-3-207.7. Judges have no discretion to increase the floor, a mandatory minimum, of 25 years (or 26 in this

case, based upon a jury finding) to, say, thirty-five or forty years. There are only two options: 25 to life or life without parole. *Alleyne* stands for the proposition that any fact which supports the increase from the mandatory minimum of 25 years to a mandatory life sentence is an “element” that must be submitted to the jury.

CONCLUSION

For the reasons set forth above, Mr. Reyos requests this Court to reverse the decision of the trial court and remand the matter for a new trial.

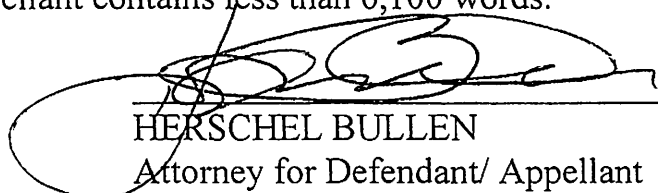
SUBMITTED this 29 day of August, 2016.



Herschel Bullen
Attorney for Defendant/Appellant

CERTIFICATE OF RULE 24 COMPLIANCE

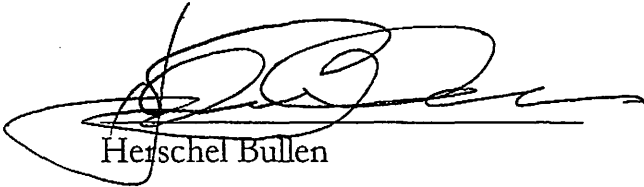
Appellant certifies pursuant to Rule 24(f)(1)(C) Utah R. App. P. that the foregoing Reply of appellant contains less than 6,100 words.



HERSCHEL BULLEN
Attorney for Defendant/ Appellant

CERTIFICATE OF SERVICE

I, Herschel Bullen, hereby certify that I have caused to be hand-delivered an original and 7 copies of the foregoing to the Utah Court of Appeals and a searchable pdf CD, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and 2 copies along with a searchable pdf CD mailed by United States Mail, postage pre-paid, to WILLIAM M. HAINS, Esq., Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 29 day of August, 2016.



Herschel Bullen